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No. 241.

United States Supreme Court

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GLOBE REFINING COMPANY,
PLAINTIFF IN ERROR,

vs.

LANDA COTTON OIL COMPANY,
DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States, for the Western District of Texas.

Brief for Plaintiff in Error,

BY

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STATEMENT OF THE PLEADINGS AND ACTION OF THE COURT.

This was suit by plaintiff in error for damages by reason of a breach of contract on the part of the defendant; in this, that on the 24th day of July 1897 defendant entered into a written contract with the plaintiff to sell and ship to it ten tanks of prime, crude cotton seed oil @ 15¾c. per gallon of 7½ lbs. f. o. b. buyers tanks, at New Braunfels, Texas, to be billed to plaintiff to such points as defendant directed and the defendant to draw a sight draft, without exchange, with bill of lading attached for payment. It being stipulated that the

delivery was to be on specific dates; viz: 5 tanks last half of August and 5 tanks first half of September of same year. Whereby it was contemplated and understood at this time that the plaintiff was to send its tank cars from Louisville, Ky. to New Braunfels, Texas, a distance of about one thousand miles, ready to receive the oil during said times, to be loaded along as demanded by plaintiff, within aforesaid dates, time being of the essence of the contract.

Plaintiff claimed, that in compliance with the contract, plaintiff, with full knowledge of the defendant, from time to time during the whole of the dates for the shipment of the said oil at great expense and trouble, sent its tanks as aforesaid the long distance as aforesaid, to the defendant's mills for the reception of the said oil. That this was at an expense of about $900.00, which it was compelled to pay to the railroad companies for transporting said tank cars to New Braunfels, and was a clear loss unless defendant filled them, (*same being an advance on the contract.*) That two tanks and one partly filled by defendant was, during the latter part of August shipped out and paid for under the contract, but the defendant refused to fill the remaining seven tanks, and failed and refused to notify plaintiff that he would not do so until about the end of the time plaintiff was to receive the last cars, when plaintiff, under the directions of the defendant, had incurred the expenses of sending all of the tank cars to the defendant's mills as agreed on, although it was alleged that the defendant had made up his mind on the 2nd of September and did on that date refuse compliance with the contract which was in full time to prevent the heavy and unnecessary expense of plaintiff sending said cars from Louisville, thus wilfully and intentionally causing the plaintiff the unnecessary expense of advancing for freight, and loss of same, and use of its cars and other losses complained of, itemized at $1,000.00, $700.00, $340.00 and $740.00 respectively set out in

the petition in addition to the loss it had on the difference arising from the price plaintiff was to pay for the oil, and what he would have had to pay to get other oil, had it been able to get same at all (which was alleged it could not) from other sources.

Plaintiff also alleged that by reason of defendant's failure to inform it of his intention to refuse compliance with the contract, when he intended and did do so, it was thereby unable to otherwise provide or save itself from loss, of which the defendant had notice. That is, it lost money by reason of it not being able to comply with its own contracts by reason of its dependence on defendant to comply with its specific arrangements to deliver as specified in the contract, which the defendant knew was relied on by plaintiff for specific delivery, plaintiff not being informed of the breach until twelve days after same was breached and this through the wilful design and intention of the defendant, and at a time when oil could not be procured at all.

Defendant interposed special exceptions to each and all of the items of damages claimed by plaintiff, and the court sustained all of them, except the items as to the difference between the contract price of the oil and *the value of the same at the time of the breach of the contract.*

Notwithstanding plaintiff did not know of the breach at the time made, and in the face too of the fact that the price then, when he was so informed, which was twelve days later, had risen 1¼ cents in said twelve days, and in the face of the further fact that by reason of the plaintiff not being able to ship its tank cars back over the same line had to lose the freight and cost of sending them from Louisville to New Braunfels, this being well understood and in contemplation of the parties when the contract was made, and refusing also to consider testimony on any other issue, and in passing upon this last issue the court, over plaintiff's objec-

tions and exceptions, heard the plea to the jurisdiction alone and not in connection with the main cause of action, and this too without a jury, notwithstanding plaintiff demanded one.

Thus, after excluding all other issues, the court refused to allow plaintiff a jury to pass on the question of whether the facts showed the difference between the contract price of the said oil, and the value of the same at the time of the breach thereof, also as to whether it meant when the plaintiff was informed or whether the oil could be procured at all, holding that these issues of fact as well as of law were in its province and not that of the jury, requiring plaintiff to leave the determination of such pleas of fact, as well as of law to the court, and upon this only issue. In arriving at this determination the court admitted and considered, and based its judgment upon a letter written in the spirit of compromise (see bill of exception No. 2) when same did not comprehend the true measure and basis of damages nor conclude plaintiff from claiming other and further damages, and that the value of the damage under consideration was less than two thousand dollars, and further in the face of positive proof to the contrary, showed that the value of the oil, when plaintiff was informed of the breach, the oil even under only one item of damage under consideration was alleged, and we think proven to be over $2,000.00.

With general statement of the case, we present the following assignments of error:

FIRST ASSIGNMENT OF ERROR.

The court erred in sustaining the defendant's exceptions to plaintiff's first amended original petition which same holds in effect that plaintiff is not entitled to recover for freight, trouble and transportation of the tank cars as well as of all that part thereof which seeks to recover rent for the use of said tank cars; also that seeking to recover for loss of customers,

contracts, credits and reputation, the court in effect holding that the same were insufficient upon which to base a claim for damages, stating in said decree that the pleadings showed no facts constituting a cause of action outside of what it termed the ordinary damage, which it held to be the difference between the contract price of the oil and the value of the sale at the time of the alleged breach thereof, and the court refused to consider testimony upon any other issue.

We desire to present under this assignment two propositions and questions thereunder.

First Proposition.

Under the allegations of plaintiff's first amended petition, (and also under original petition) plaintiff claimed, under the special understanding, conditions and circumstances arising in this case that it was entitled to receive for certain freight charges advanced, trouble and loss for the use of its cars, by reason of the manner of the defendant's breach of the contract, in this, and other losses mentioned in the assignment that the freight complained of as being lost would not have been advanced, and having been advanced would have been refunded to him had the shipment been made, and the overtime loss of the use of the cars would not have happened, and if plaintiff's petition set up a valid claim in this regard the court had jurisdiction of the case and should have heard the evidence thereon.

Remarks.

The first question to be presented to the court is, as to whether or not there is any cause of action stated, outside of the difference in the contract price of the oil and what it was when the breach was made, not when it became known to plaintiff, the court holding that there was not, and we holding the affirmative.

Second Proposition.

The second is, as to whether the fact that plaintiff could not procure the oil from other sources, at the time of the breach or when it was informed of same, in time to supply itself and save the advances would cut any figure, i. e. made any difference in the rule for damages as announced by the trial court, by which is meant the difference between the purchase price and the price at time of breach, or at any time when breach was made known to plaintiff. We take it that it does make a difference and would change the rule, for if plaintiff could go into the market and supply himself he would not suffer the same loss as when he could not, and if he could have done so when the breach was first made and could not when it was first made known to him there should be a change in the rule especially when plaintiff had advanced its money on the contract by paying $900.00 freight, sent away from home its cars, the use of which was worth $700.00, and other losses set out in petition.

Remarks.

If we have to advance money to receive the goods, i. e. go to expense to get goods, we should be entitled to at least such part of this advancement as we would have received back, had the contract been complied with, and it is certain in my judgement that if plaintiff could not procure the oil at the time of the breach, or when breach was made known to him, that this breach would do away with the rule laid down by the court. It is claimed in the pleadings that the defendant knew of the right of plaintiff for a refunding, in case the said tanks when filled were returned over certain lines. We are at a loss to see why we would not get all moneys advanced on the contract, after the defendent had determined to cancel same, i. e. twelve days pass from the time he breaches the contract before he informs us of the fact; now if by conceal-

ing this fact we continue to incur expense, a different rule steps in. For instance, suppose plaintiff had been promptly notified on Sept. 2nd, that he cancelled or repudiated the contract and it could have saved the expense of shipping the cars to Texas, and the loss of the use of the cars for one month and to have been able to procure from other sources the oil contracted from the defendant and been able to meet its engagements at Triste and elsewhere, just the same as if defendant had filled the tanks in accordance with the contract. Then the defendant would certainly have been liable under the terms of the Hadley Bexadale case for the difference between the contract price and the market value of the oil at that date, i. e. the date of the breach or when the oil should have been delivered, although plaintiff had not sent all of its cars down to Texas. The spirit of that decision reaches beyond the mere difference of price when circumstances justify. That case says that the measure of damages "would be either such as may fairly and reasonably be considered as arising naturally * * * * or such as may reasonably be supposed to have been in contemplation by both parties at the time they made the contract, as the probable result of the breach of it."

Now if the special circumstances under which the contract was actually made, were communicated by the plaintiff to the defendant, when it was made, and were thus known to both parties, the damage resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of the contract under those special circumstances so known and communicated:

Now in this case the declaration in the petition states (and it is admitted by the drummer) that the defendant had notice of all the special matters upon which damages are specially claimed. We take the liberty to quote from the petition as follows: "That in pursuance of and in compliance with the

said contract the plaintiff at great expense and trouble sent from time to time its tanks as required by the said agreement to the defendant's said mills to have the cars at said mills for the reception of the said crude oil at the time agreed upon as aforesaid. In order to do this the plaintiff was under the necessity of obligating itself unconditionally to the railroad company (and of which the defendant had notice) to pay to it for the transportation of the said cars from said Louisville to said New Braunfels in the sum of nine hundred dollars, which amount, it obligated itself to pay, and which it was compelled to pay to said companies, before the first day of January 1898 and which amount was paid by reason of its said contract with defendant and defendant's obligation to fill said tanks with oil as aforesaid and was incurred as an advancement on said oil contract. * * * That at the time of the breach of the said contract by the defendant, as aforesaid, crude oil of the kind and quality aforesaid, and for which the plaintiff had contracted with the defendant was worth 18¾c per gallon and same was worth 18¾c on the market and it would have cost that much to have replaced same in proper time, but by reason of the disorganized condition of the market and defendant's failure to notify plaintiff of said real breach of contract at time of breach, plaintiff was wholly unable to get the oil at all and that at the time that the plaintiff was notified of the breach the oil was worth 20c per gallon, and thereafter before the bringing of this suit was worth 25c per gallon. But plaintiff was wholly unable to procure same at all at the time or place of delivery of said oil, or at any time thereafter at said place, although every effort was made to do so, it requiring the plaintiff a number of days to negotiate so as to get other oil, necessarily losing much time."

"That the defendant contemplated the breach of said contract intending so to do, wrongfully caused, directed and instructed plaintiff to send its tank cars from Louisville, Ky.

to New Braunfels, Texas, a distance of 1000 miles at an expense and loss to plaintiff of $1,000.00 knowing at said time, and during the time said cars were in transit that he would not fill said cars and that plaintiff could not get same filled at any price at said place and knowing that plaintiff would lose the use of said cars unnecessarily and would lose much valuable time in arranging to procure other oil from other sources, if at all, and knowing that he would not be able to replace the oil that the defendant procured and agreed to furnish as aforesaid, and having full notice from the plaintiff that the said oil must and should be furnished plaintiff by the 15th day of September, 1897, defendant having positively agreed to furnish said oil by said 15th day of September, 1897. That the defendant wrongfully cancelled said contract on the 2nd day of September, without giving any notice thereof to plaintiff until the 14th of September, having determined to do so before the 2nd of September, knowing in the meantime and all of the time that plaintiff was forwarding the cars to New Braunfels as aforesaid, at great expense and loss of time, and knowing that the plaintiff could and would take advantage of said two weeks time to have supplied himself from other sources, and have saved the plaintiff this loss, and notwithstanding that the plaintiff had determined not to fill plaintiff's tank cars with oil, he deliberately had plaintiff to send them on from said Louisville to New Braunfels, and at no time did he countermand said directions, but induced said plaintiff to incur said expense unnecessarily. That plaintiff did so wilfully and maliciously, causing the loss already stated, which was an unnecessary loss to plaintiff of two thousand dollars, which plaintiff could and would have saved had the defendant notified the plaintiff of its said wrongful intention to violate said contract, at or near the time it determined to do so. That the defendant had full notice that the plaintiff relied on it to furnish said oil by the 15th of September, and had full know-

ledge that the plaintiff could not procure the same from any other source, and well knew that the plaintiff would suffer the losses herein set up if it did breach said contract in the manner herein charged, wherefore the defendant became liable and bound to pay said damage herein set up.

"That by reason of said breach of contract by defendant, plaintiff has lost the use of his said tanks by reason of defendant not informing him of his intention to fill said tanks for a period of at least thirty days, each reasonably worth three dollars each per day, wherefore plaintiff is damaged in the further sum of $700.00. Plaintiff further says that time was of the essence of the contract in this, that the defendant by the terms of the contract was to fill at least five tanks with oil by the first of August, 1897, when in truth and in fact it only filled three of them, although the plaintiff had the empty tanks for the reception of said oil on hand ready to be filled and in every way complied with the terms of its said agreement; and that it had expected, and had arranged, and had contracted with the defendant to that effect, and had arranged with its own customers to furnish the said seven tanks of oil within a certain period of time which contemplated the sharp compliance by the defendant with said contract, all of which facts as above stated was well known to the defendant, and the defendant had contracted to that end with the plaintiff, and if the defendant had so complied with the terms of said agreement plaintiff would have been able to have furnished its said customers with the oil as aforesaid, but plaintiff failed to meet its obligations to its customers by said failure of defendant to deliver in said time said tanks, and it was too late to fill plaintiff's orders and contracts after defendant's notice and failure and refusal to deliver said oil, whereby it was subjected to the heavy damage and loss of $740.00, thereby losing said customers and contracts, and suffering the loss of its credit and reputation to its damage in the further sum of $1,000.00.

"Plaintiff further alleges, that in asking for the shipment of said oil, plaintiff was under the necessity of arranging to send and sending at great expense its tanks from distant points, the defendant's said mills to receive said oil, all of which was well known to the defendant's, and in contemplation of the aforesaid contract, and was well understood by both plaintiff and defendant that at the time of making and entering into said contract, that plaintiff was required to pay additional freight in order to re-arrange the destination of the various tanks to other points. That the additional rate of freight that the plaintiff was under the necessity of paying and which it had to pay by reason of the breach of the aforesaid contract upon the part of the defendant and which was the necessary and proximate loss and expense incurred thereby, was the sum of $350.00. That said expense was brought about by the unwarranted failure on the part of the defendant to carry out its said contract as hereinbefore stated, and that the said planning and expense incurred in the moving of the said cars holding said tanks to meet the emergencies and to reach other points to be filled were unavoidably incurred, and for all of which the defendant's became liable and bound to pay."

Upon exceptions by the defendant the court held "that all the part of plaintiff's petition which seeks to recover for freight, trouble and transportation on the tank cars, and all that part which seeks to recover rent or for use of tank cars, and all that part thereof, seeking to recover for loss of customers and contracts, credit and reputation, should be struck out, as stating no cause of action." The court declaring "that the measure of damages was the difference between the contract price of the oil and the value of same *at the time of the alleged breach thereof*, and that it would not consider any testimony not bearing upon this issue in the pleadings." (Rec. p. 15.)

It will here be noted that the trial court in reaching its conclusions as to the jurisdiction to hear this case, excluded from its consideration every item of contention for damages, except *the difference between the purchase price* (viz 15¾c per gallon, there being 48053⅛ gallon shortage) and *the value of same at the time of the alleged breach thereof*" which was claimed by defendant to be $1,438.00.

QUESTION.

Does the law, in cases where the price is not paid or part paid, fix the time of the breach as the time of comparison or when plaintiff actually knew of the breach, or what it would cost plaintiff to replace the article purchased?

Suppose there was none to be had at the time? Would this answer the trouble? Does not the law fix the difference between the contract price and the price at time of breach, provided the article can be had at the time of the breach, and the plaintiff is informed thereof whereby he not only has an opportunity and time to supply himself. In other words how can he be supposed to protect himself unless he knows of the breach and has the facilities or ability to do so. The language of the court quoted above from a celebrated case and adopted all over America, as shown by a host of authorities in Field on Damages Sec. 252, 253 and 254 especially under later section, under the heading of Hadley vs. Baxendale. We here present other authorities on the subject of damages that fairly and reasonably arise from breach of the contract.

Under the allegations and proof, which showed that plaintiff could not procure the shortage of oil at *any price* when first informed of the breach of the contract, the plaintiff, would have been entitled to a charge to the jury (had there been one allowed) to the effect that if this was the true measure of damage, would have been otherwise determined than on the line laid down by the court, to-wit: The difference

between the contract price and what it was at time of the breach. That is defendant has kept the fact of its breach to itself, speculating on the price of oil going down and if so he will comply with it.

AUTHORITIES.

Taylor Mfg. Co. vs. Hatcher & Co., 3 L. R., 587 from U. S. Court S. Dist. of Georgia.
Smith vs. Bolles, 132 U. S., 125.
Grand Tower Co. vs. Phillips, 23 Wall, 471.
G. C. S. F. Ry. Co. vs. Dunman, 85 Tex., 179.

PROPOSITION TWO UNDER FIRST ASSIGNMENT.

In this case as shown above, while the plaintiff had not advanced the whole price of the goods he had advanced this freight, never to get back, and advanced the use of its tank cars so as not to have them for use to send to other places. This being true we say the rule would be the same as when the price of the goods had been advanced that is the highest price up to the time of suit and such other losses as reasonably arose out of the breach.

AUTHORITIES.

Chatham vs. Jones, 69 Tex., 745.

ARGUMENT.

The doctrine as laid down in the Hadley Baxendale case and those following this line of decisions, as to the difference in the contract price and that at the time of the breach, is based upon the fact that no part of the price was paid or the purchaser has not made any advancement, Sec. 249 of Field on Damages p. 236, commenting on this case says: "The reasons for the rule, *where no portion of the price has been paid*, are, that the plaintiff in order to receive full indemnity

should receive only such a sum as united with the price agreed to be paid for the article purchased or contracted for would enable him to go into the market and secure the same at the time of the breach. This, it is claimed would make him whole. And the theory is that the vendee would thereby be placed in the same condition as though the vendor's agreement had been fully complied with.

"But this limited rule does not apply where the property has no general market value and is not purchased as an article of commerce for sale or where the property is purchased or to be manufactured and delivered for a *particular purpose, which purpose is known to the vendor*, and the vendee sustains a damage by the non-delivery at the time stipulated, which was natural and probable to result from the non-delivery; nor to cases where the actual loss, though remote, was contemplated or may be reasonably supposed to have been contemplated by the parties at the time of making the contract as the probable result of the breach of it in which cases the defendant is liable for such damages." Further on it is said that "the reason assigned for allowing the purchaser the benefit of an advance in the price of property when the vendor has failed to deliver according to contract, where the purchaser has paid the price are, that on the failure to deliver, the purchaser being deprived of his money, may not be able to purchase at the time. Besides the defendant would not be allowed to take advantage of his own wrong, and by refusing to deliver the property enjoy the benefit of an advance upon it; and if an advance occurs he has had, or might have had the benefit of it, and the law should presume that he had enjoyed the benefit of the best price which the property has commanded; that the plaintiff, if the defendant had observed his contract, could have enjoyed the benefit of the advance; that as against the wrong doer, it should have been presumed that he would have improved the opportunity; and

that being deprived of both the property and the price, every presumption would be made in his favor."

AUTHORITIES.

This same doctrine is upheld under the same heading by all the text writers on Damages.

See Southerland on Damages under Hadley vs. Baxendale.
169 U. S., 115-682.
Randon vs. Barton, 4 Tex., 295-6.
Cartwright vs. McCook, 33 Tex., 613.

On this subject we refer the court to a very learned opinion from 16 N. Y., p. 489 and we also quote from Field on Damages, Par. 255: "In Griffin vs. Colver, the doctrine is stated by Selden J. as follows: "The party injured is entitled to recover all of his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, they must be such as must naturally be expected to follow its violation. And they must be certain both in their nature and in respect to the cause from which they proceed.

The foregoing statement is assumed to embrace the proposition, that under the two alternative heads, in the opinion of the English case, both those damages that arise in the natural course of things and those that have been contemplated by the parties. The doctrine is sustained and approved by many American cases cited in the annexed note.

This doctrine is further supported in decisions from nearly all of the states: Hambleton vs. McPherson, 28 N. Y., 72; 33 N. J., 513; Richardson vs. Chynowith, 26 Wis., 656, it is said in that case that; "in Wisconsin where the seller had knowledge that the goods were ordered by the purchaser for a

particular occasion, and there was a failure of the vendor to so deliver and no sufficient time remained after the breach for the purchaser to purchase the goods elsewhere to supply the demand for that occasion, the vendor was held liable for such damages directly and naturally arose from the breach, although beyond the difference between the contract and the market value."

SECOND ASSIGNMENT OF ERROR.

The court erred in its ruling as shown in bill of exception No. 1 wherein, over plaintiff's objection the court took up and disposed of the plea to the jurisdiction before trying the case on its merits by the jury, refusing to hear same with the merits or to consider any testimony except as to the amount of the differences between the contract price of the oil and the value of same at the time of the alleged breach thereof, eradicating all other issues.

First Proposition under Second Assignment.

The court having held that the pleadings state sufficient matter to state a cause of action, as shown under first assignment, and that there were facts to be determined, we claim that in order to reach the entire case, that it should hear all the facts and not merely those appertaining to the plea in abatement.

Statement.

By reference to bill of exception No. 1, p. 17 of the record, the court will see that the proposition states the ruling of the court and that we excepted to it at the time.

Authorities.

Blachley vs. Davis, 1 McLean, (U. S.,) 412.
70 Fed. Rep., 370.
56 Fed. Rep., 434.
18 Howard, (U. S.,) 76.
Wetmore vs. Rymer, 169 (U. S,,) 121.

THIRD ASSIGNMENT OF ERROR.

The court further erred in its ruling upon bill of exception No. 1, wherein the court refused to allow the plaintiff to have a jury to pass on the facts in issue on plea to jurisdiction holding that the issues of facts as well as of law was in its province and not that of the jury, and required the plaintiff to leave the determination of such a plea of fact as well as of law to the court upon one issue set out in the second assignment herein.

We submit this assignment as a proposition and refer the court to the bill of exception No. 1 in the record, page 17, to show that we asked for a jury and the same was refused. It reads as follows:

"Be it remembered that when the above stated cause was called for trial, the following proceeding were had to-wit: The councel for the defendant demanded a trial of his plea to the jurisdiction of the court to hear and determine the cause, and that this be heard separately from the main cause of action, and not with it, and although plaintiff objected to this separation, the court overruled the objection and ruled that the plea to the jurisdiction be heard separately. Plaintiff then and there excepted to said ruling. Thereupon the plaintiff called for a jury to try the issues of fact raised by the plea to the jurisdiction, but the court refused to submit such facts to the jury, and that under the the laws of the United States it was within the province of the court and not of the jury. To this ruling of the court the plaintiff then and there excepted and objected, and tenders this his bill of exception and asks that same be made a part of the record, which is done, and the Court hereby certifies to the Supreme Court this cause upon the issue presented aboved."

Signed, Dec. 13, A. D. 1901.

T. S. MAXEY, Judge.

STATEMENT.

We have already stated the issues of fact to be passed upon in the declaration, and refer the court to this. Also what the petition sets out in the record herein, pp. 2 to 3.

Defendant's sworn plea denying the truth of the allegations as to value is set out on pages 9 and 10 of the record; its answer on pp. 11 to 14.

The court's decree is on page 15 and 16 of the record. It will be observed in that decree, that in sustaining defendant's four exceptions to the various claims and items of damages, that the court sums them up and says: "That the measure of damages is the difference between the contract price of oil and *the value of same at the time of the alleged breach thereof.*"

The question then arose as to whether this amounted to more than $2,000.00, leaving out of the consideration that the oil could not be procured at all, at the time it was informed of the breach, and we claim a right to submit this fact to the determination of the jury, which was refused, the court concluding that it was its prerogative to do this and not cognizable by the jury, and in so doing, based its verdict upon a letter of compromise by the plaintiffs, to which defendants objected as is shown more fully in fourth assignment herein set out in bill of exception No. 2, trans. p. 18 and specially on page 28.

It will be noticed also, that the court ignored all allegations and testimony, that the oil could not be secured at any price when the breach was made known to plaintiff. (Trans. .) Also the testimony of Fergueson: "that it was the universal custom for cotton seed oil to be sold on special delivery. The price varying for different deliveries according to supply and demand for the particular delay." (Trans. p. 27.)

There were many other matters of fact that showed any thing else than a clear case of jurisdiction, to which a jury would have a right to consider.

REMARKS.

In arriving at a conclusion as to whether the court has jurisdiction, there are many things to consider and it is not absolutely required that the oil should have been worth 20c. per gallon at the time of breach, nor that it was worth that at the time plaintiff was informed of same. It may have probably have been so, or that plaintiff thought so in good faith when he brought suit, or it may be that the oil could not be procured at that time at any price. In either event, plaintiff had the right to have a jury to pass on these matters rather than a judge who was calculated to take a view from a jury, of the facts, whether more accurate is not for us to say. True, he may have the right to set aside the verdict of the jury on this point, but this would not give him the right to usurp the prerogative of a jury, as understood by the laws of this country. The constitution of the United States and Texas, both provide for a jury in cases where matters of fact are to be determined.

True, Sec. 5 of the Acts of 1875, required the Circuit Court to dismiss a suit whenever it shall appear to its satisfaction, that the suit does not really and substantially involve a dispute of controversy within the jurisdiction of the court. It is said in the case of Blackley vs. Davis, 1 McLean, U. S., 412, that the questions of fact is usually tried by a jury. In the case of Wetmore vs. Rymer, 169 U. S. 117. It seems that this court held that, that section was repealed by the Act of March 3rd, 1887, and of Feb. 25th, 1889. Then in 1891, (26 Stat. at L., 826, Chap. 517,) provide that the Supreme Court has jurisdiction to review any final decree in any case in which the jurisdiction of the trial court is in issue, and unless it appears that as a matter of law, the court can say that it has not jurisdiction, we had a right to have it passed upon by a jury. This court, delivering its opinion in that very interest-

ing and carefully prepared opinion in the above case of Wetmore vs. Rymer, 169 U. S., p. 119, uses on this point the following language: "Undoubtedly the general rule is that upon a writ of error only matters of law appearing on the face of the record can be considered, and that evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record unless made so by some regular proceeding at the time of the trial before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdictisn according to the course of the common law; and ordinarily a bill of exception lies only upon some point arising either upon the admission or rejection of evidence, or is a matter of law arising from a fact found, or not denied, and which has been overruled by the court. Continuing in this opinion, it is shown that under the act of 1875, the trial court was not bound to the pleadings but could go outside of them, but that being repealed, holding further that while in *equity* cases the range would be greater, in cases at *law* the judgment must be based upon the verdict of a jury *or upon facts found in an agreed statement.*

Holding further that the Statute does not prescribe any particular mode in which the question of jurisdiction is to be brought to the attention of the court, nor how, when raised, shall be determined. The court proceeded further on the latter part of page 120, saying that the trial court might submit the issues to the jury, and then upon the admission of evidence or charge of the court submit errors committed to the Supreme Court.

Continuing the court is requested to read carefully the above case, as the principles announced, are pertinent to the one at bar.

Now as to the right of trial by jury, we cite Art. 7 of the United States Constitution, also Art. 914 of United States Revised Statutes, which provides that the practice, pleadings and modes of proceedures in the Circuit Court shall be the same as in the state where the circuit court is held. Now the Texas Constitution provides that:

"That the right of trial by jury shall remain inviolate." Art. 1, Sec. 15, State Cons.

The Statutes of the State specially provide for jury to determine all questions of facts.

Art. 648 of the U. S. Rev. Stat. provides: "that the trial of issues of fact *shall be by a jury.*" Art. 649, however, provides: parties may waive a jury. This was not done in this case.

FOURTH ASSIGNMENT OF ERROR.

The court erred in its ruling as set fourth in bill of exception No. 2, wherein it admitted in evidence the letter and statement set out in said bill, and considered same as conclusive of the amount of damage, or amount of loss to which plaintiff would be entitled to recover.

STATEMENT.

By reference to page 23,(original print 30) of Transcript will be found the letter, then following on next page is the statement in question. This letter and statement was objected to on the following grounds:

1st. That same was in the nature of a compromise and that this was shown by the depositions of witness thereon filed herein and set out hereafter in this bill of exception and was not intended and did not operate as conclusive of the amount of damage to which plaintiff was entitled.

2nd. Because the same did not conclude the plaintiff from claiming other and further damage in case same was not accepted.

3rd. Because the same did not comprehend the true basis or measure of damages.

But the court overruled said objections and admitted and considered said testimony."

The only testimony offered on the subject of this letter was that of Louis K. Ferguson, President of the Company whose testimony set out in this same bill of exception on page 25 of trans. (beginning at p. 32 of original print,) that part relating to this letter and statement begins at the top of page 28 of the trans. and takes up two-thirds of that page and the court is specially asked to read same, as it shows that same was in the nature of a compromise settlement. This testimony as shown was taken in May 1900 (trans. 25) 18 months before the exceptions were filed to plaintiff's original petition, or in fact any plea had been filed by the defendant.

The common law holds that no proposition on compromise shall be offered in evidence. It is also the law in Texas, well settled as against public policy, as compromises tend to discourage law suits, to offer this character of testimony.

ARGUMENT.

If the court considered the testimony at all it must have held same to be conclusive of lack of jurisdiction, for according to this the damage would not reach $2,000.00. If it was considered at all same was in violation of a well settled doctime of Texas which forbids the use of matter offered in compromise. Piaintiff so, testified and said it did not pretend to comprehend the damages suffered. The defendant offered no verbal testimony. Plaintiff offered abundant testimony that this was not all the damages, the court usurped the preroga-

tive of the jury and refused to allow plaintiff a jury. The testimony of the only sworn witness showed that the amount of oil contracted for was ten tanks of a capacity of 49,500 to 50,000 pounds. The only testimony as to the capacity was that the plaintiff had to pay freight on tanks at the rate of 50,000 pounds per tank (trans. 26) and the contract, contemplated this amount, this was equal to 6,666⅔ gallons per tank. There being seven tanks and 1153 gallons short on other tanks equal in all 47,820 gallons this at a profit of 4¼ cents per gallon (being 20c per gallon) aggregates $2032.30 at ¼ cent less we have $1912.80 at ½ cent less equals $1793.20.

Now add this to any of the other items of damage that was excluded from consideration by the court sustaining exceptions of defendant and we would have far over the $2,000.00. Or considering the allegations in the petition and the positive proof thereon to the effect that at the time plaintiff was informed of the breach he could not secure the oil at any price and that the facts alleged and proved that these were to be specific deliveries, and that time was of the essence of the contract, and we have a case that goes far over $2,000.00 in damages.

We take it that the case above referred to (Wetmore vs. Rymer) on page 122 of 169 U. S., which holds that the trial court shall be "*satisfied*" means that the facts create a legal certainty, that is, an absolute certainty that it has no jurisdiction.

AUTHORITIES.

63 Tex. 276.
1st. Jones on Ev., Sec. 293.

FIFTH ASSIGNMENT OF ERROR.

The court erred in its fiindings and rulings as shown in bill of exception Nos. 2 and 3 wherein it held that the evidence showed conclusively that the court had not jurisdiction of this

suit and the matter in controversy did not exceed $2,000.00 and in considering the matters set out in letter of Sept. 11, 1897, and that the allegations for more than that sum, were fraudulently made to confer jurisdiction.

STATEMENT.

To prevent repetition we here specially refer the court to our statement and argument under the fourth assignment.

We also call attention to our statement and argument under first and 3rd assignments, p. hereof, and to the general or introductory statement, p. hereof.

If we conclude that the oil would cost 20c. per gallon, we have a difference of more than $2,000.00, and there was proof of this fact. By reference to Trans. p. 26, the witness says: "On Sept. 13th, 1897, we paid 20c. for a lot of oil at Memphis, the rate of freight from Memphis rules one cent per gallon less than in Texas, etc," which would make this oil equal to 18½ to 19 cents in Texas, although, as we have stated we could not get the oil in Texas at that price. The burden of proof was on defendant to show want of jurisdiction.

The letter of defendant, Sept. 2nd, 1897, Trans. p. 26, shows that the defendant refused to sell them at 18½ cents, and had none to sell at that price, sale, if at all, to be "conditioned on seed receipts, and no change in the market." Witness says further: "It is the universal custom for cotton seed oil to be sold on special delivery. The price for different deliveries varying according to the supply and demand for the particular delivery. We made the contract with Landa for five tanks in August, and five tanks the first half of September, so we could make a contract for refined oil based on this delivery of crude oil allowing what time was needed to get the oil from New Braunfels to Louisville, Ky. At the time that the defendant refused to deliver us the oil as stated, there was little oil offering for the reason that the mills were advancing the price

of seed on each other, and we could not get anything like the amount of crude oil for shipment, that we could dispose of as refined oil. The oil for prompt shipment was very scarce, and the mills were inclined to sell for future delivery." Witness says that the plaintiff was for first time informed by letter on the 14th of Sept., 1897, of the brearh. (Trans. p. 27.) With this letter from the defendant on Sept. 2nd, he refused to sell at 18½ cents, and the proof unquestioned of the fact that the price continued to rise, and plaintiff had to pay 20c. for it at Memphis, and could not get it at all in Texas. It seemed a little extraordinary that the court could have found plaintiff to have made a fraudulent allegation under such circumstance and that it should be able to hold, beyond a doubt, that theoil, to-wit: 47820 gallons at probably 20c., if to be had at all, and in Texas not at all, was fraudulent and justified the court to dismiss the suit, and this as a *matter of law*.

AUTHORITIES.

Witmore vs. Rymer, 169 U. S., 120.
Hartoz vs. Memory, 116 U. S., 588.
Dwyer vs. Bosset, 63 Tex., 274.
Chatham vs Jones 69 Tex., 745.

SIXTH ASSIGNMENT OF ERROR.

The court erred in rendering judgment and dismissing the cause for want of jurisdiction and for costs of court, when it should have submitted the whole matter to a jury upon its merits.

STATEMENT.

This assignment brings in review the right of the court to sustain the special demurrers and also its arbitrary course in refusing a jury and dismissing the case, because it concluded that the amount on the one issue on which it heard testimony,

to-wit: difference in contract price and the price at the time of the breach of contract, was insufficient to give it jurisdiction. It appearing from the petition that the oil could not be had at all at time of breach. The court ignoring the contention altogether and holding us to the rule of difference of prices as aforesaid, whether the goods could be obtained or not. Now we say that this Honorable Court shoul review the rulings of the trial court, to see if the petition stated a cause of action, safe against the special demurrers of defendant; that is, do any of the special damages besides that upon which the court heard the evidence state matter upon which the plaintiff had a right to be heard? and if so, we have a right to have the cause remanded for that purpose, and if it was probable or possible that the issue trial would go over $2,000.00, we also contend that we have a right to have a jury to determine the issues of fact set up.

And of these matters herein we most respectfully submit to the consideration of the Honorable Supreme Court of the United States.

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Attorneys for Plaintiff in Error.